

**COMMITTEE ON THE PROTECTION OF PRIVACY
IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW**

Chair: Prof. Dr. Dres. h.c. Burkhard Hess

Activity Update

January 2018

1. On 13 October 2017, the Committee convened at the Max Planck Institute Luxembourg for Procedural Law for its fifth meeting. The meeting was attended by 11 members from 8 ILA branches and 7 observers.

2. In the framework of the Committee's activities, on 12 October 2017 the Max Planck Institute Luxembourg for Procedural Law organized, in co-operation with the Brussels Privacy Hub, a conference on 'Jurisdiction, Conflicts of Laws and Data Protection in Cyberspace'.

3. In accordance with the mandate conferred by the International Law Association in 2013, the ILA Committee on the Protection of Privacy in Private International and Procedural Law ('the Committee') focuses on the promotion of international co-operation and the contribution to predictability on issues of jurisdiction, applicable law, and circulation of judgments in privacy matters, taking into account, *i.a.*, data protection matters and human rights.

4. The Committee includes experts from Australia, Austria, Belgium, Brazil, France, Germany, Italy, Japan, the Republic of Korea, Luxembourg, Portugal, Spain, the United Kingdom, and the United States of America.

Synopsis of the Committee's Earlier Activity

5. At its first meeting, on 29 September 2014, the Committee had a lively and fruitful discussion on its future actions and methodological approach. With a view to examining the concrete problems regarding privacy protection, the Committee decided to undertake a comparative analysis of the different concepts of privacy in the various legal systems by circulating a questionnaire that led to the drafting of the Committee's Interim Report 'The Concept of Privacy in The National Systems'.¹

6. At its second meeting, from 26 to 27 February 2015, the Committee commenced discussion on the different concepts of privacy (addressing, *i.a.*, the legal framework of the

¹ In the framework of the Committee, a conference was hosted on 30 September 2014 the proceedings of which have been published in 2015.

protection of privacy, its constitutional dimension, its material and personal scope, the competing interests involved in the protection of privacy, and the available remedies). In its discussion, the Committee envisaged to extend the scope of its activity also to the protection of privacy in the new social media.

7. At its third meeting, on 18 January 2016, the Committee addressed the scope of its activity. It took note of the fact that, while the approaches and the solutions adopted in the different legal systems with respect to privacy matters appear to differ considerably, the underlying problems are functionally very similar. The Committee also took note of the high degree of interaction between the protection of privacy and constitutional and fundamental values and their impact on the solutions adopted not only by substantive law but also by private international and procedural law. There was consensus that the Committee should draft guidelines and principles (as opposed to rules) providing a sense of the problems and the available solutions with regard to the protection of privacy.

8. With a view to developing guidelines that take into account the inherent complexities of privacy protection, but that are also sufficiently flexible to deal with different approaches adopted by the various legal systems, a questionnaire was circulated on the issues of jurisdiction and applicable law in privacy matters, and a draft report was subsequently drafted addressing these issues from a comparative standpoint. The Committee also discussed the general structure of its guidelines. It started to draft the guidelines, in particular with respect to the notion of privacy, remedies, and jurisdiction.

9. On 8-9 August 2016, the Committee met in the framework of the 77th ILA Biennial Conference, which was hosted in Johannesburg from 7 to 11 August 2016. In particular, on 8 August 2016 the Committee held its Open Working Session under the chairmanship of Prof. Dr. Catherine Kessedjian. On 9 August 2016 the Committee met for its fourth Meeting. Consensus was reiterated that the Committee should address issues of jurisdiction, applicable law, and recognition and enforcement of judgments with respect to:

- the protection of personality rights against violations between private parties and by mass media, especially with regard to non-contractual claims, also taking into account the question of the liability of Internet service providers and intermediaries;
- the protection of privacy in social networks, especially with regard to contractual and non-contractual claims;
- data protection.

Questions of consumer protection and protection of minors, as well as alternative dispute resolution mechanisms will also be included in the Committee's activity.

Report of the Fifth Committee Meeting

10. At its fifth meeting, the Committee reviewed and discussed in detail questions of jurisdiction and applicable law on the basis of, respectively:

- a Preparatory Note prepared by Prof. Dr. Jan von Hein to assist the discussion within the fifth Committee meeting; and

- the Draft Guidelines drawn up on the basis of the discussions held during the third and fourth Committee meetings, and further amended by the Chair and Prof. Dr. Jan von Hein with a view to the fifth Committee meeting.

11. Consensus was reached that the Committee is working towards a private international law instrument which, as such, encompasses issues of private enforcement. Such instrument, however, is not meant to encompass public enforcement within its scope.

12. It was remarked that the concept of data protection is to be included in the scope of the Committee's activity, albeit some fine-tuning may be necessary as a result of the specificities that are inherent to data protection. It was further noted that alignment between provisions on privacy and on data protection is desirable.

13. Cognizant that the scope of the Committee's work is key, the Committee foreshadowed the need to collect comments and insight from experts from non-Western countries.

14. Consensus was reached that jurisdiction be based on the defendant's place of habitual residence and that adequate and foreseeable grounds of jurisdiction be provided for both contractual and non-contractual claims.

15. Consensus was reached that coincidence between forum and applicable law is highly desirable.

16. With respect to jurisdiction over non-contractual matters, doubts were raised on whether the requirement of foreseeability offers a sufficient connection to satisfy the due process clause under the constitutional laws of some jurisdictions.

17. Consensus was reached that the following aspects be included in the Draft Guidelines: branch jurisdiction/establishment (in this respect, it was observed that it should be avoided that this head of jurisdiction lead to a global jurisdiction); co-defendants; counter-claim; jurisdiction for follow-on lawsuits; a head of jurisdiction for contractual claims regarding relationships between social media and users.

18. Consensus was reached that prorogation of jurisdiction should, in principle, not be allowed notwithstanding an exception for B2B contracts. It was suggested that submission to jurisdiction not be excluded, but it was deemed a good practice that a consumer be informed by the court of the consequences of bringing the claim.

19. Consensus was reached that subsidiary jurisdiction is not a specific topic of privacy. Therefore, there was agreement that it does not need to be included in the Draft Guidelines.

20. It was discussed whether a head of jurisdiction on the right to reply is necessary. In favour of this solution it was noted that including such head of jurisdiction would protect publishers in countries where there is no such right (especially when important publishers have assets in other countries so that the enforcement may be obtained outside the publisher's home State). Against this solution it was observed that, in any event, to ensure enforcement the lawsuit would probably be brought in the State where the publisher has its seat; further, it was noted that this is not a jurisdictional issue, and rather falls in the scope of which remedies are available under the applicable law.



21. There was consensus that, if the term 'social media' is used, a definition should be included. In this context, it was noted that the risk exists that such definition be too narrow since Internet platforms are undergoing constant changes and developments.

22. With respect to the law applicable to B2C contracts, there was consensus that, in the context of privacy, choice-of-law agreements should be prohibited because this area of the law is closely connected to human rights and, as such, it does not offer much room to deviate from the law otherwise applicable.

23. As for the recognition and enforcement of judgments, it was reiterated that a filter mechanism protecting fundamental values of the requested State should be provided.

Upcoming Activities

24. The Committee is scheduled to submit and present its First Interim Report at the 78th ILA Biennial Conference, which will take place from 19 until 24 August 2018 in Sydney (Australia).

25. In the meantime, the Committee invites its Members to share thoughts, in particular on the question of the territorial reach of injunctions.